

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 209 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO
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STATE OF GUJARAT

Versus

VITTHALBHAI BECHARBHAI PATEL

Appearance:

MR BY MANKAD for Petitioner - State

MR BP DALAL for Respondent No. 1-2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 06/09/2001

ORAL JUDGEMENT

1. The State has filed this Revision Application being aggrieved and dissatisfied with the order of the learned Judicial Magistrate, First Class, Modasa, District Sabarkantha, passed on 15.2.1999, discharging both the accused who are respondents herein under Section 239 of the Cr.P.C. for the offences punishable under

Sections 406 read with Section 114 of the IPC.

2. Brief facts go to show that one Devchand Kodarbhai Rathod filed a Criminal Complaint in the Court of Judicial Magistrate, First Class, at Modasa, being Criminal Case No. 116 of 1996 against both the respondents herein for the offences punishable under Sections 403, 406, 408, 420 and 114 of the IPC. It was complained that Vaniad Kokapur Kelavani Mandal is a registered Trust at Sabarkantha, under the Bombay Public Trust Act, 1950. The Complainant Devchand Kodarbhai Rathod is a Member of the Executive Committee of the Trust. Trust has constitution and accordingly accused No.1 is the President and accused No.2 is the Secretary of the Trust. It was further stated that the Trust owned one house at village Vaniad - Kokapur, bearing Gram Panchayat No. 1/81 (new no.90). In this property, education activities was carried on by the Trust. Around January 1993, accused No.1 and 2 in abatement for their own purpose sold the junk and debris and old broken building materials of the said house and received an amount of Rs. 18,566/- out of such sale, which amount was not credited by both the accused in the accounts book of the Trust. There were other allegations also. Two of them are (i) in 1992 - 93, the accused obtained an amount of Rs.10,000/- from one Dinaben M. Prajapati on the pretext that the same was required for the donation to the Trust for educational activities and in lieu of that Dinaben M.Prajapati was appointed as Teacher in the school run by the Trust. It was alleged that this amount of Rs. 10,000/- was not credited in the accounts book of the Trust and (ii) the other incidence is regarding one Principal Mr. Umeshkumar D. Joshi from whom, it is alleged that, the accused received an amount of Rs. 20,000/- on 2nd July, 1994. The amount was obtained as donation and Umeshkumar D.Joshi was promised to promote as Principal of the Trust School. Except the aforesaid three allegations, there are other allegations also, but those allegations would not be relevant for the purpose of this Revision. Learned Judicial Magistrate, First Class, forwarded the complaint of the complainant to the Police for investigation under Section 156(3) of the Cr.P.C. After investigation, Police submitted charge sheet against present respondents for the offences punishable under Sections 406 and 114 of the IPC. The allegations levelled were (i) for obtaining amount after selling debris and junk of the house belonging to the trust and converting the amount for the personal use; (ii) for obtaining Rs. 10,000/- from Dinaben as donation and not crediting the same in the Trust Account and (iii) for Rs. 20,000/- which the accused obtained from

Principal Umeshkumar by way of donation and did not credit the same in the account of the Trust. In the charge sheet further details regarding the sale of debris and junk of the house of the Trust were also given.

3. Both the accused - present respondents herein filed an application before the learned Magistrate vide Exh.10 in Criminal Case No. 789 of 1997 because the charge sheet was numbered as such, for discharging them from the charges levelled against them under Section 239 of the Cr.P.C. Vide order dated 15.2.1999, learned Judicial Magistrate, First Class, Second Court, allowed the application of both the respondents - original accused and discharged them for the offences punishable under Sections 406 and 114 of the IPC as per Section 239 of the Criminal Procedure Code.

4. Being aggrieved by the said order, the State has filed this Revision Application. It was mainly contended by learned APP Mr. B.Y. Mankad that the learned Magistrate has failed to appreciate the prima facie evidence which is on record in the shape of report of the investigation under Section 173 of the Criminal Procedure Code. It was urged that witnesses Devchand Kodarbhai, Umeshkumar D. Vyas, Premjibhai Shamjibhai Patel, Ramanbhai, Maganbhai and Dinaben in uncertain terms stated before the Police that the amount was entrusted to the present accused No.1 as mentioned in respective statement of the witnesses. It was urged that the learned JMFC failed to take this fact in consideration. It is urged that the order passed by the learned Magistrate is illegal, improper and bad in law. It is stated that the Magistrate concerned has wrongly discharged the accused and the order passed is required to be quashed.

5. On the other hand, learned Advocate for the respondents Mr. B.P. Dalal, has argued that the charge cannot be framed against the present respondents, firstly, on account of the fact that taking the cognizance by the Magistrate of the offences charged against the present respondents is barred by limitation as per Section 467 of the Criminal Procedure Code. Even if, according to Mr. Dalal, taking the date as 25th January, 1993 for the sale of debris. That the cognizance, even if it is considered to be taken from the filing of the charge sheet, then also it is beyond the limitation period of three years because the charge sheet is filed on 25th March, 1997. It is urged that under Section 406 of the IPC, punishment of three years imprisonment is provided for. Therefore, the Court is

required to take cognizance of the offence within three years from the commission of the offence, and hence, on this count against both the accused, court now cannot take the cognizance and frame the charge. It was urged as a second contention that the accused are facing the charge under Section 406 of the Indian Penal Code i.e. for the criminal breach of trust. It was contended that as defined under Section 405 of the IPC, the salient ingredients of criminal breach of trust are two. Firstly, there must be entrustment and secondly conversion of the property for the use of the accused which is entrusted to him. Learned Advocate Mr. Dalal argued that there is some evidence of entrustment because in some statements, the witnesses said so, but there is no iota of evidence, prima facie, from the report of the investigation that the amount was entrusted was converted for the use of the accused by the accused. It was urged that therefore there was no primary evidence available against the accused to frame the charge under Sec. 406 of the I.P.C. Whatever evidence, according to the learned Advocate is available is in the shape of hearsay evidence and the statements of the witnesses. It was further stated that it is not the case of the prosecution that the purchasers of debris of the house demanded the receipt of the money and it is also not the case of the prosecution that the receipt was demanded and it was refused by the accused. Therefore, according to the learned Advocate, no offence under Section 406 was disclosed. The attention of the Court was also drawn to the statement of a witness, who writes the accounts book. The Clerk Premji Shambhai states that the accounts of the school of recent years is not written because there was no audit. However, in the daily cash book of 1993, 1994 the concerned authority has signed. Therefore, it was urged that there is no case that the accused converted the amount for his own use and hence the charge under Section 406 cannot be framed. So far as the amount of Rs. 20,000/- which Principal Umeshkumar D. Vyas donated to the accused is concerned, it was urged that there was no evidence for this also that the said amount was converted into own use of the accused. So far as the amount of Rs. 10,000/- given by witness Dinaben to the accused No.1 is concerned, it is stated that the accused had filed their affidavits in the Revision and a pay in slip of the banks is produced on record denoting that the said amount of Rs. 10,000/- was deposited in the Bank account of the Trust and in the rojmal it was mentioned that the said amount was received from Dinaben by way of donation and hence the question of misappropriation of the amount would not arise. It was also contended that as per Sec. 219 of the Cr.P.C. an accused cannot be

tried for the same kind of more than three offences committed within the space of one year. It was urged that if we peruse the papers, even if we go through the evidence of selling of debris of the house, then, the offences of the same kind are more than three within the space of one year for which the accused cannot be tried at one trial, which itself is an illegality and, therefore, also the alleged charge cannot be framed against the accused. The attention of the Court was further drawn to Section 83 of the Bombay Public Trust Act, 1950 wherein it is specifically provided that no prosecution for an offence punishable under this Act, shall be instituted without the previous sanction of the Charity Commissioner. It is urged that the facts of the present case are covered by Sections 32 to 34 of the Bombay Public Trust Act and no prosecution can be instituted without the previous sanction of the Charity Commissioner. It is urged that though the Complainant had approached the Charity Commissioner but the sanction was refused. It is urged that the order passed by the learned Magistrate is neither incorrect nor perverse nor illegal and, therefore, the interference is not called for in the revisional jurisdiction of this Court. Reliance is sought to be placed on a decision of Himachal Pradesh High Court in the matter of SMT. BADOMO DEVI vs. STATE AND ANR, reported in 1980 Cri. LJ 1143 wherein it is observed that the court is to apply its mind in framing of the charge against the accused and then arrive at a conclusion, independent of and uninfluenced by the police opinion whether the material placed before him if accepted at its face value, would furnish a reasonable basis or foundation for the accusation. Mr Dalal, learned Advocate for the respondents has also placed reliance on a decision of the Supreme Court in the matter of CENTURY SPINNING & MANUFACTURING CO. LTD vs. THE STATE OF MAHARASHTRA, reported in AIR 1972 SC 545, wherein the Apex Court has observed that the order of framing the charges does substantially affect the person's liberty and it cannot be said that the court must automatically frame the charge merely because the prosecuting authorities by relying on the documents referred to in S. 173 consider it proper to institute the case. The responsibility of framing the charges is that of the court and it has to judicially consider the question of doing so. Without fully advertng to the material on the record it must not blindly adopt the decision of the prosecution.

6. Having regard to the rival contentions, the sole question which arises is whether the order of the learned Judicial Magistrate, First Class, is legal or incorrect

so as to call for the interference of this Court in its revisional jurisdiction. Undoubtedly, so far as the accused No.2 Ishwarbhai Joitabhi Patel is concerned, there is no evidence at all against accused No.2 to book him for the offence punishable under Section 406 of the IPC. Not a single witness states that any donation of amount was entrusted to accused No.2 Ishwarbhai Joitabhai Patel. It appears that only because he was the Secretary of the Trust, is arraigned as an accused with the aid of Section 114 of the Indian Penal Code. However, so far as the accused No.1 is concerned and having regard to the reasoning of the learned Magistrate is concerned, it is clear that there is prima facie case against accused No.1 Vitthalbhai Becharbhai Patel to frame a charge under Section 406 of the IPC. The learned Judge has wrongly considered the materials on record and has come to the conclusion that there was no prima facie case against any of the accused. The fact that the accounts of the trust were audited is weighed with the learned Magistrate but on the facts of the case, it is clear that even if the accounts of the Trust are audited, the offence under Section 406 of the IPC, prima facie, appears to have been committed so as to frame a charge. The witnesses concerned, undoubtedly stated before the Police that for the debris of the house, the amount was entrusted to accused No.1. Secondly the amount of donation was also entrusted by witness Dinaben and Umeshkumar to accused No.1. The police has seized the record of the school by panchnama drawn on 3rd August, 1996 which includes the daily cash book of the school. The same way, Police also seized other account books vide panchnama dated 26th August, 1996. The statement of Clerk Premjibhai Shamjibhai Patel does not reveal that the amount which was entrusted to accused No.1 was credited to the accounts book of the Trust. This is the prima facie observation for the framing of the charge. These circumstances itself denote that the amount entrusted to the accused No.1 was misappropriated or converted by him for his own use, for which, no other substantial evidence as to actual personal use or personal conversion, as urged by the learned Advocate for the respondent is required. The learned Magistrate has not taken this fact as well as the statements of witnesses in consideration and, therefore, he erred in arriving at a decision that the accused No.1 was required to be discharged. The sanction of the Charity Commissioner as per Sec. 83 of the Bombay Public Trust Act is required only for a criminal prosecution to be instituted for the offences mentioned in the Bombay Public Trust Act. Those offences are mentioned by Section 66 of the said Act. They are different types of offences described in the Section for

which the punishments is also mentioned. Section 32 is for duty to keep regular accounts for which the fine on proved contravention can be imposed upto Rs. 1,000/-. It was urged and it was considered by the learned Magistrate that since the offence was covered by the Act and accounts were audited by the Auditors, and no complaint was filed after obtaining the sanction of the Charity Commissioner, there was no offence disclosed against the accused No.1 also. The reasoning of the learned Magistrate is not only erroneous but perverse also. The offence under Section 32 of the Bombay Public Trust Act, 1950 is altogether a different from the offence described under Section 406 of the IPC for which by no stretch of reasoning a sanction of the Charity Commissioner would be required. Not obtaining sanction for prosecution for the breach of Section 32 would not create a bar for the prosecution under Section 406 of the IPC. In that view of the matter, there is at this prima facie juncture or it may be observed that there was at relevant juncture proper material before the learned Magistrate to frame charge against accused No.1 and hence the order of the learned Magistrate is required to be set aside to that extent. In this Revision, the accused i.e. respondent No.1 has come with the case that the amount which was entrusted to him by Dinaben of Rs. 10,000/- was deposited in the bank account of the Trust, for which a xerox copy of the pay in slip is produced along with the Rojmal of 23.11.1991, which denotes that Rs.10,000/- was received as donation vide Entry No.37 of the rojmal. However, this is the defence of the accused and will have to stand the scrutiny of the Trial Court. At this stage, this defence cannot be considered but the material on record must be considered as the per guidelines given by the Supreme Court in Century Spinning & Manufacturing Co. Ltd. (Supra) cited by the learned Advocate for the respondents and even without being influenced by the opinion of the police, it appears that the case under Section 406 is made out against accused No.1.

7. so far as the plea of limitation and clubbing more than 3 offences of the same kind is concerned, the same can be considered by the Trial Court while framing charge against accused No.1. This is so because for the limitation, provision under Section 469 of the Cr.P.C. entitles the prosecution to explain the delay and that liberty must be awarded to the prosecution, if the Trial Court comes to the conclusion that cognizance of the offence is barred by limitation. In this view of the matter, the following order is passed.

" The Revision Application is dismissed against accused No.2. The Revision Application is partly allowed against respondent No.1 to the extent that the order impugned of discharging accused No.1 is quashed and set aside. The learned Judicial Magistrate, First Class, Modasa, is directed to consider of the framing of the charge against accused No.1 afresh, after giving full opportunity of being heard to the accused No.1 and prosecution as well after considering the material available on record as well as taking into consideration the fact whether the cognizance of the offence is time barred and after taking into consideration whether accused can be tried in one trial for the three offence committed within a space of one year as per Section 219 of the Cr.P.C. and with these directions the record of the Trial Court is remanded to the Judicial Magistrate, First Class, Modasa. Office is directed to immediately return the record. Learned Magistrate is also directed to expedite the matter as expeditiously as possible. Rule is made absolute to that extent.

(J.R. Vora J.)

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